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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

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| THE STATE OF ARIZONA,<br><br>Appellee,<br><br>v.<br><br>HECTOR RODRIGUEZ RUIZ,<br><br>Appellant. | ) | 2 CA-CR 2008-0002<br>DEPARTMENT A<br><br>MEMORANDUM DECISION<br>Not for Publication<br>Rule 111, Rules of<br>the Supreme Court |

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20062653

Honorable Gus Aragón, Judge

AFFIRMED IN PART
REMANDED IN PART

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Tucson
Attorneys for Appellee

Robert J. Hirsh, Pima County Public Defender
By Dawn Priestman
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H O W A R D, Presiding Judge.

**¶1** After a jury trial, appellant Hector Rodriguez Ruiz was convicted of one count of aggravated driving under the influence while his license was suspended or revoked and one count of aggravated driving with an alcohol concentration of 0.08 or more while his license was suspended or revoked. The court sentenced him to two concurrent, enhanced, substantially mitigated prison terms of six years. Ruiz appeals, contending the court erred in admitting an allegedly tainted in-court identification and in failing to determine if his admissions to two historical prior felony convictions were knowing and voluntary. Because we find no abuse of discretion with respect to the identification evidence, we affirm Ruiz's convictions. Regarding Ruiz's admissions to the prior convictions, the state concedes fundamental error. Because we agree with that concession, we remand for an evidentiary hearing to determine whether the error was prejudicial.

**In-Court Identification**

**¶2** Ruiz first argues the trial court erred when it permitted the state to introduce a tainted in-court identification without holding an evidentiary hearing. Because Ruiz neither objected to the adequacy of the hearing the court did hold, nor requested an additional hearing, he has forfeited review of this claim for all but fundamental, prejudicial error. *State v. Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d 601, 607 (2005). The defendant has the burden to show error, that the error was fundamental and that it caused him prejudice. *Id.* ¶¶ 20, 23.

**¶3** When an in-court identification is challenged based on suggestive pretrial identification procedures, the trial court must conduct an evidentiary hearing to determine

whether such procedures were unduly suggestive and if so, whether the identification was derived from an independent source and thus reliable despite the suggestive procedure. *See State v. Dessureault*, 104 Ariz. 380, 384, 453 P.2d 951, 955 (1969). But "[m]ere suggestion" during the identification procedure does not violate due process. *State v. Tresize*, 127 Ariz. 571, 574, 623 P.2d 1, 4 (1980). "Rather, in order to make out a constitutional violation, the suggestion must be so 'unnecessary' or 'impermissible' as to create a 'substantial likelihood of irreparable misidentification' based on the 'totality of the circumstances.'" *Id., quoting Neil v. Biggers*, 409 U.S. 188, 196-97 (1972); *see also State v. Schilleman*, 125 Ariz. 294, 297, 609 P.2d 564, 567 (1980) (in-court identification not tainted by suggestive procedures if reliable in view of totality of circumstances).

**¶4** Furthermore, the United States Supreme Court has never "set any guidelines for in-court identification procedures nor indicated that in-court identification must be made in a way that is not suggestive." *United States v. Domina*, 784 F.2d 1361, 1368 (9th Cir. 1986). And we are aware of no Arizona case that has interpreted *Dessureault* to require a hearing based on allegedly suggestive identification procedures that occur during trial.

**¶5** At trial, while Officer Azuelo was testifying, the state asked him the following question: "Do you recognize the driver of the truck and the person you made contact with as the defendant who is seated at the defense table today?" Before Officer Azuelo answered, Ruiz objected, arguing the state was impermissibly leading the officer's testimony. The court

sustained the objection and granted Ruiz's request that Officer Azuelo's identification testimony be precluded.

**¶6** Ruiz also contended that the anticipated identification testimony of Officer Coutts—who was in the courtroom at the time the state asked Officer Azuelo the purportedly leading question—was tainted. The court temporarily excused the jury and asked Officer Coutts a series of questions regarding the basis for his ability to identify the defendant. Officer Coutts testified in response that he was present at the time of the incident, had personally made contact with Ruiz, had "[c]learly" gotten an adequate look at him, could ignore the "suggest[ive] questions" asked at trial and could identify Ruiz based solely on his contact. At the conclusion of this questioning, the court ruled that it would allow Officer Coutts to make an in-court identification during his testimony.

**¶7** Ruiz argues the court erred in failing to conduct a *Dessureault* hearing. First, we agree with the state that *Dessureault* does not apply to Azuelo's in-court identification of Ruiz or to the state's purportedly suggestive procedures in attempting to elicit that identification. *See Domina*, 784 F.2d at 1368. In fact, multiple witnesses often identify the same defendant in court, either in one another's presence or at least in the presence of the investigating officer who will later also identify the defendant.

**¶8** Second, even if *Dessureault* applied, the trial court's questioning of Officer Coutts out of the jury's presence was sufficient. This questioning established that Officer Coutts's identification of Ruiz was derived from a source independent of the allegedly

leading question[1] and therefore reliable. *See Dessureault*, 104 Ariz. at 384, 453 P.2d at 955. Ruiz did not object to this questioning, nor did he request that the court hold a more comprehensive evidentiary inquiry. Moreover, the alleged taint here was no more than a "mere suggestion" and the court could conclude that no "'substantial likelihood of an irreparable misidentification'" existed. *Tresize*, 127 Ariz. at 574, 623 P.2d at 4, *quoting Biggers*, 409 U.S. at 197. Ruiz has therefore not shown that any error occurred, much less error that could be characterized as fundamental and prejudicial. *See Henderson*, 210 Ariz. 561, ¶ 23, 115 P.3d at 608 (to establish fundamental error, defendant "must first prove error").

**¶9** Ruiz further contends the court contributed to the likelihood of misidentification by referring directly to the defendant when questioning Officer Coutts about the basis for his identification. Ruiz did not object to the court's questions and has therefore forfeited this argument absent fundamental error. *See id.* ¶ 19. Ruiz does not argue fundamental error with respect to this issue and has not sustained his burden to show any alleged error in the court's questioning constituted fundamental, prejudicial error. *See id.*

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[1]In view of our resolution, we need not decide if the question was truly leading. According to *State v. McKinney*, 185 Ariz. 567, 575, 917 P.2d 1214, 1222 (1996), a leading question suggests the answer, such as "'The cat was black, wasn't it?'" A "question is not leading just because the answer is obvious." *Id.*, *quoting State v. Agnew*, 132 Ariz. 567, 577, 647 P.2d 1165, 1175 (App. 1982).

**¶10** Finally, Ruiz minimally asserts the trial court erred in denying his motion for mistrial on the ground that the identification evidence had been tainted. But Ruiz has not adequately developed this argument and we therefore deem it waived. *See* Ariz. R. Crim. P. 31.13(c)(1)(vi); *State v. Burdick*, 211 Ariz. 583, n.4, 125 P.3d 1039, 1042 n.4 (App. 2005).

**Admissions to Prior Convictions**

**¶11** Ruiz also argues the trial court fundamentally erred when it failed to determine if his admissions to two prior felony convictions were knowing and voluntary. The state concedes fundamental error.

**¶12** As we previously stated, if a defendant fails to object to an error at trial, we review the issue raised on appeal solely for fundamental error. *Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d at 607. As we also noted, the defendant has the burden to show both fundamental error and resulting prejudice. *Id.* ¶ 20. When a defendant admits to a prior conviction, the trial court must determine whether his admission is voluntary and intelligent. *See* Ariz. R. Crim. P. 17.3, 17.6; *State v. Morales*, 215 Ariz. 59, ¶ 8, 157 P.3d 479, 481 (2007). The court must directly address the defendant in open court and ensure, inter alia, that the defendant is aware of the constitutional rights he is giving up, that he has not been coerced into making the admissions, and that he understands the potential sentences he is facing by admitting the prior convictions. Ariz. R. Crim. P. 17.2, 17.3; *see also State v. Alvarado*, 121 Ariz. 485, 489, 591 P.2d 973, 977 (1979). Failure to engage in the requisite

colloquy pursuant to Rule 17 constitutes fundamental error. *See Morales*, 215 Ariz. 59, ¶ 10, 157 P.3d at 481-82.

**¶13** After establishing that fundamental error has occurred with respect to a Rule 17 colloquy, the defendant must also show prejudice. *See id.* ¶ 11. Generally, this means the defendant must demonstrate that he was "'ignoran[t] of the matters on which the court failed to inform him'" and had he been properly informed, he would not have admitted to the prior convictions. *State v. Carter*, 216 Ariz. 286, ¶ 21, 165 P.3d 687, 691 (App. 2007), *quoting State v. Medrano-Barraza*, 190 Ariz. 472, 474, 949 P.2d 561, 563 (App. 1997). When the record on appeal is insufficient to resolve the question of prejudice, this court will remand the matter to the trial court for an evidentiary hearing. *Id.* ¶¶ 21-22.[2] If the defendant is able to establish prejudice at that hearing, he is entitled to be resentenced. *Id.* ¶ 27.

**¶14** Here, Ruiz argues the trial court failed to inform him of the sentencing ranges to which he would be exposed by admitting the prior convictions; failed to determine that his admission was not the result of coercion, threats or promises; and failed to determine that he

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[2]Remanding to give the defendant an opportunity to prove prejudice is inconsistent with general fundamental error analysis after *Henderson*. Generally, a defendant who cannot establish prejudice based on the record on appeal is not entitled to any form of appellate relief. *See, e.g.*, *State v. Dickens*, 187 Ariz. 1, 10, 926 P.2d 468, 477 (1996) (according to record, no prejudice resulted from alleged error in granting continuance); *State v. Bartolini*, 214 Ariz. 561, ¶¶ 16-17, 155 P.3d 1085, 1089 (App. 2007) (insufficient prejudice resulting from presumption instruction shown "on this record" and thus no reversal warranted); *State v. Munninger*, 213 Ariz. 393, ¶¶ 14, 16, 142 P.3d 701, 705 (App. 2006) (record contains no evidence to support speculation of prejudice from alleged sentencing error and sentence thus affirmed). But because the state concedes error and requests a remand in this case, we do not address the departure from Arizona fundamental error jurisprudence set forth in *Carter*.

understood he would be giving up his constitutional right against self-incrimination as well as his rights to a trial, to counsel, and to confrontation. Ruiz did not object to these errors below.

**¶15** With respect to the latter two contentions, the record of the colloquy does not support Ruiz's arguments. The court informed him that if he did not admit to the prior convictions he would have the right to a trial, the right to counsel, the right to confront and cross-examine witnesses, and the right against self-incrimination. When asked if he understood, Ruiz responded, "okay." Although he describes this response as equivocal, in context, the record shows he was aware of his rights and understood that admitting the prior convictions would mean he was foregoing those rights. That is precisely what the court had a duty to determine. Ariz. R. Crim. P. 17.3. Ruiz further affirmed that no one had promised him what his sentence would be and that no one had "threaten[ed] or forc[ed] [him] to enter into these admissions." We find no error with respect to these aspects of the colloquy. *See* Ariz. R. Crim. P. 17.2(c), 17.3.

**¶16** With respect to the applicable sentencing ranges to which Ruiz was exposed by admitting his prior convictions, the record shows the trial court did fail to inform him of this information. The state concedes fundamental error. Accordingly, because we agree that fundamental error occurred, we remand for an evidentiary hearing to determine whether Ruiz was prejudiced by this error. *See Carter*, 216 Ariz. 286, ¶ 27, 165 P.3d at 693. During this hearing, the trial court must determine whether Ruiz was aware of the applicable sentencing

range and, if not, whether he would have admitted the prior convictions if he had been properly informed. *Id.* ¶ 21. If Ruiz can show such prejudice at the hearing, his sentence must be vacated and he is entitled to be resentenced. *Id.* ¶ 27.

**Conclusion**

**¶17** In light of the foregoing, we affirm Ruiz's convictions and remand for an evidentiary hearing consistent with this decision.

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JOSEPH W. HOWARD, Presiding Judge

CONCURRING:

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JOHN PELANDER, Chief Judge

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J. WILLIAM BRAMMER, JR., Judge